Supreme Court, U.S.
FILED
MAY 10 1996
CLERK

(2)

No. 95-1444

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRET E. CAHILL, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

J. DAVITT MCATEER
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

JUDITH D. HEIMLICH
Attorney
Department of Labor
Washington, D.C. 20210

12 pp

QUESTION PRESENTED

Whether petitioner lacked standing to sue the Secretary of Labor for allegedly violating his First Amendment rights by failing to require States operating federally subsidized employment offices to give former employees, including petitioner, access to the offices' communication services.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984)	6
Bermudez v. *United States Dep't of Agriculture*, 490 F.2d 718 (D.C. Cir.), cert. denied, 414 U.S. 1104 (1973)	7-8
Califano v. *Westcott*, 443 U.S. 76 (1979)	7
Cornelius v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985)	6, 7
Harris v. *McRae*, 448 U.S. 297 (1980)	7
Heckler v. *Chaney*, 470 U.S. 821 (1985)	4
International Soc'y for Krishna Consciousness, Inc. v. *Lee*, 505 U.S. 672 (1992)	6
King v. *Smith*, 392 U.S. 309 (1968)	8
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974)	7
McKay v. *Horn*, 529 F. Supp. 847 (D.N.J. 1981)	8
Perry Educ. Ass'n v. *Perry Local Educator's Ass'n*, 460 U.S. 37 (1983)	6, 7
Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976)	8
Rivera v. *Patino*, 524 F. Supp. 136 (N.D. Cal. 1981)	8
Rosado v. *Wyman*, 397 U.S. 397 (1970)	8
Rust v. *Sullivan*, 500 U.S. 173 (1991)	7
Singleton v. *Wulff*, 428 U.S. 106 (1976)	8

Cases—Continued: Page

United States Postal Serv. v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) 6
Warth v. *Seldin*, 422 U.S. 490 (1975) 6
Williams v. *Zbaraz*, 448 U.S. 358 (1980) 7

Constitution, statutes and regulations:

U.S. Const.:
Art. III 5, 6
Amend. I 6, 7
Administrative Procedure Act, 5 U.S.C. 701(a)(2) 4
Job Training Partnership Act, 29 U.S.C. 1501 *et seq.* 2
29 U.S.C. 1512 2
29 U.S.C. 1532 2
Wagner-Peyser Act, 29 U.S.C. 49 *et seq.*:
29 U.S.C. 49 2
29 U.S.C. 49b(a) 2
29 U.S.C. 49c 2
29 U.S.C. 49g 2
29 U.S.C. 49g(a) 2
29 U.S.C. 49g(d) 2
29 U.S.C. 49g(e) 2
29 U.S.C. 49k 3
29 U.S.C. 49*l*(a) 2
20 C.F.R.:
Section 652.2 3
Section 652.3 3
Section 652.6(a)(4)(iii) 3
Section 652.8(g)(1) 3
Section 652.8(j) 3
Section 652.9 3

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1444

BRET E. CAHILL, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not reported, but the judgment is noted at 63 F.3d 1111 (Table). The opinion of the district court (Pet. App. 8a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1995. A petition for rehearing was denied on December 19, 1995. Pet. App. 13a-14a. The petition for a writ of certiorari was filed on March 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Wagner-Peyser Act in 1933 to establish the United States Employment Service (USES) "to promote the establishment and maintenance of a national system of public employment offices." 29 U.S.C. 49. The Act, as amended by the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.*, directs the Secretary of Labor, through the USES, to assist state public employment services nationwide by, *inter alia*, "furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States." 29 U.S.C. 49b(a).

To obtain funding under the Act, a State must, by legislation, accept the Act's provisions and designate or create a state agency with the powers necessary to cooperate with the Department of Labor (DOL). 29 U.S.C. 49c. The state agency must submit to the Secretary a detailed plan for carrying out the provisions of the Act. 29 U.S.C. 49g(a); see generally 29 U.S.C. 49g, 1512, 1532. The Act requires the Secretary to approve state plans that "are in conformity with [the Act] and reasonably appropriate and adequate to carry out its purposes." 29 U.S.C. 49g(e). The Secretary is authorized "to establish performance standards for activities under [the Act]," but, in doing so, must "take into account the differences in priorities reflected in State plans." 29 U.S.C. 49*l*(a). The only prescribed content of a state plan under the Act is that it provide opportunities and services for the handicapped. 29 U.S.C. 49g(d).

b. The Secretary is authorized to promulgate "such rules and regulations as may be necessary to

carry out the provisions of" the Act. 29 U.S.C. 49k. The Secretary's regulations state that "[t]he basic purpose of the employment service system is to improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking workers." 20 C.F.R. 652.2. The regulations require that, "[a]t a minimum, each State shall administer a labor exchange system which has the capacity: (a) To assist jobseekers in finding employment; (b) To assist employers in filling jobs; (c) To facilitate the match between jobseekers and employers; (d) To participate in a system for clearing labor between the States," and "(e) To meet the work test requirements of the State unemployment compensation system." 20 C.F.R. 652.3; see 20 C.F.R. 652.6(a)(4)(iii).[1] The manner in which those goals are met is to be set forth in annual state plans. 20 C.F.R. 652.6(a)(4)(iii). The Secretary is authorized to "impose appropriate sanctions and corrective actions for violation of the Act, regulations, or State plan," which may include reduction of funding to the State's program. 20 C.F.R. 652.8(g)(1).

2. Petitioner, who is neither a jobseeker nor an employer, wrote to the Department of Labor "demanding that it allow—or require the States to allow—'former employees' to use the interstate network" of state-run employment offices to disseminate "information about employers (*e.g.* facts about pay scales, turnover, working conditions, and advancement oppor-

---

[1] The regulations prohibit discrimination in the provision of services under the Act based on, among other things, "political affiliation or belief," 20 C.F.R. 652.8(j), and bar referrals to jobs that are vacant due to labor disputes, 20 C.F.R. 652.9.

tunities) to jobseekers." Pet. App. 3a; see Pet. 4. The Department of Labor responded by letter that the Act vests discretion in the States to establish program priorities and goals. *Ibid.* The Department pointed out that States are free under the Act to establish "a public forum consisting of a reference network of former employees for job seekers to know more about jobs." *Ibid.* The Department's letter suggested that petitioner "contact the appropriate State official with [his] proposal." Pet. App. 3a-4a; Pet. 5.

3. Petitioner, acting pro se, sued the Department and Secretary of Labor, alleging that "his First Amendment rights are being violated because state-run employment offices prohibit him from using their facilities to disseminate information about employers." Pet. App. 3a. In his view, the Department "violated the First Amendment by failing to issue regulations requiring the States to provide these services to non-employers." *Id.* at 5a. He sought an injunction ordering the Department to require the state employment offices to provide him with the same services as they provide to employers, and to require employment offices to post notice of those services. *Id.* at 4a, 19a (proposed notice).

The district court, relying on *Heckler* v. *Chaney*, 470 U.S. 821 (1985), dismissed petitioner's complaint on the ground that the Department's decision "not to implement a former employee's network" was an unreviewable matter committed to agency discretion under Section 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. 701(a)(2). Pet. App. 11a-12a.

4. The court of appeals, in a per curiam order, affirmed the dismissal on different grounds. Pet. App. 1a-8a. The court held that petitioner lacked standing under Article III to bring this action. Assuming that

petitioner alleged "an actual or threatened First Amendment injury capable of being redressed by judicial action," the court held that he failed to "demonstrat[e] that this injury is the proximate result of the DOL's conduct." *Id.* at 7a. The court noted that the Department took no regulatory or enforcement action that restricted petitioner's rights or that discouraged the States from satisfying his request, and it concluded that petitioner thus failed to allege that any "abridgement of [his] First Amendment rights is 'fairly traceable' to" action taken by the Department. *Ibid.*

ARGUMENT

The unreported decision of the court of appeals affirming the dismissal of petitioner's complaint is correct. The decision does not conflict with any decision of this Court or with the decision of any other court of appeals. Further review is not warranted.

The court of appeals affirmed the dismissal of petitioner's complaint because he failed to "demonstrat[e] that [his] injury is the proximate result of the [Department's] conduct." Pet. App. 7a. Petitioner complains that he was not allowed to use the communication services of the state public employment offices on the same basis as employers. As the court of appeals correctly observed, he failed to allege that the restrictions "stem from the DOL's violation of, or enforcement of, statutory or regulatory standards," or to "identify regulations or agency decisions that effectively prohibit or discourage States from making their federally-subsidized services available

to non-employers." *Ibid.* Because the complaint established no First Amendment violation that was "fairly traceable" to the Department, the court correctly concluded that petitioner lacked Article III standing. *Ibid.* Petitioner alleged no injury that "reasonably can be said to have resulted, in any concretely demonstrable way," from the Department's conduct. *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975).[2] Whether that defect is characterized as a lack of standing or as failure to state a cognizable claim against the Department, the judgment of the court of appeals was correct.[3]

---

[2] This case illustrates the instance where the "'fairly traceable' and 'redressability'" components of Article III standing are distinct concepts and not merely "two facets of a single causation requirement." *Allen* v. *Wright*, 468 U.S. 737, 753 n.19 (1984). An order enjoining the Department to require States to afford petitioner the access he seeks might redress petitioner's complaint, but it does not follow that the Department of Labor abridged petitioner's rights.

[3] Petitioner's First Amendment claim is without merit in any event. The claim depends on petitioner's mischaracterization of the communication channels of state public employment offices as public fora. See Complaint at 2 (¶¶ 4, 5) (alleging that public employment offices establish "government fora by custom" and "by designation"). They are, however, neither traditional nor limited public fora, but nonpublic fora. This Court has recognized many comparable facilities as nonpublic fora. See, *e.g.*, *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 683 (1992) (metropolitan airport terminal); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1995) (Combined Federal Campaign); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46-47 (1983) (interschool mail system and teacher mailboxes); *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132-133 (1981) (government-approved

Petitioner cannot trace his injury to the Department, or establish a claim against it, by invoking the fact that the overall system of public employment services was developed through "cooperative federalism." Pet. 10. The cases petitioner cites (Pet. 10-13) for the proposition that the United States' participation in a scheme of cooperative federalism subjects it to suit involved challenges to federally imposed requirements. See *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Williams* v. *Zbaraz*, 448 U.S. 358 (1980); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Califano* v. *Westcott*, 443 U.S. 76 (1979); *Bermudez* v. *United States Dep't of Agriculture*, 490 F.2d 718, 720 n.2

---

residential letterboxes); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on city transit cars).

The only basis for petitioner's contention (Pet. 9-10) that he was excluded from the communication services because of viewpoint discrimination is the fact that employers are permitted to use the communication services of public employment offices and petitioner, who is not a member of that group, is not permitted to do so. The government may, however, place on nonpublic fora restrictions "reasonable in light of the purpose served by the for[a]," including restrictions against participation by any person "not a member of the class of speakers for whose especial benefit the forum was created." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); see *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.").

To the extent that petitioner claims (Pet. 15) that the Department of Labor's unexercised capacity to require States to *create* public fora subjects the Department to First Amendment liability, there is no basis for that claim. Congress has broad discretion to refrain, or to allow federal agencies to refrain, from imposing particular requirements as a condition of state participation in a federally funded program.

(D.C. Cir.), cert. denied, 414 U.S. 1104 (1973); *McKay* v. *Horn*, 529 F. Supp. 847, 856-857 (D.N.J. 1981); *Rivera* v. *Patino*, 524 F. Supp. 136, 142 (N.D. Cal. 1981).[4] No such federal requirement or action caused the harm of which petitioner complains.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

J. DAVITT MCATEER
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

JUDITH D. HEIMLICH
Attorney
Department of Labor

MAY 1996

---

[4] Other cases petitioner cites (Pet. 11) did not involve claims against the United States. See *Singleton* v. *Wulff*, 428 U.S. 106 (1976); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *King* v. *Smith*, 392 U.S. 309 (1968).